

- A **JITENDER SINGH PAGAR SINGH & ORS**
- v.
- KERAJAAN MALAYSIA**
- B HIGH COURT MALAYA, KUALA LUMPUR
AZIAH ALI J
[ORIGINATING SUMMONS NO: R1-24-06-2009]
12 MAY 2010
- C **LAND LAW:** *Acquisition of land - Compensation - Assessment by learned judge - Whether assessment properly done - Whether sufficient weight given to valuer's reports - Whether judge had improperly limited his judicial discretion in merely concurring with decision made by assessors - Role of judge in land references*
- D **LAND LAW:** *Acquisition of land - Compensation - Award - Appeal against - Whether assessment properly done - Whether High Court judge erred in law - Whether sufficient weight given to valuer's reports - Whether judge had improperly limited his judicial discretion in merely concurring with decision made by assessors*
- E **LAND LAW:** *Acquisition of land - Compensation - Right to adequate compensation - Whether Land Acquisition Act 1960, ss. 40D(2) and 40D(3) deprive right to adequate compensation under art. 13 Federal Constitution*
- F The plaintiffs' lands were acquired under the Land Acquisition Act 1960 ("the Act"). The plaintiffs were dissatisfied with the award made and hence the Land Administrator made a reference to the High Court under s. 30 of the Act. At the land reference hearing,
- G the learned judge was assisted by two assessors, one Mr. Phuah and one Encik Basri. The learned Senior Federal Counsel relied on the valuation report prepared by a government valuer. The plaintiffs relied on the report and valuation of their private valuer. Mr. Phuah was of the view that the compensation should be RM198 per square foot, while Encik Basri was of the opinion that it should be
- H RM201.60 per square foot. The learned judge accepted the opinion of Encik Basri and made an order accordingly. The plaintiffs claimed that the opinion of their valuer appeared to have been totally disregarded. The plaintiffs also claimed that in his grounds
- I of judgment the learned judge had said that his judicial discretion

was limited by s. 40D(2) of the Act, and that he was legally compelled to concur either with the decision of Encik Phuah or Encik Basri. The plaintiffs further contended that their right to adequate compensation was deprived by the amendments to the Act which took away the judicial discretion of the judge and took away the right to appeal. Hence the plaintiffs challenged the validity of the amendments to the Act by Act A999 on the ground that their constitutional right to adequate compensation under art. 13 of the Federal Constitution had been violated, rendering the said amendments void. Hence, the plaintiffs in this application sought declarations to the effect that s. 40D(2) and s. 40D(3) of the Act were null and void and inoperative.

Held (dismissing the application with costs):

- (1) The law accords the judge with two experts whose sole role is to decide the amount of compensation after having considered the documentary evidence including the valuation reports of both parties and the submissions made. The duty of the two assessors is therefore limited to that extent. The law does not contemplate that the judge is merely to preside without listening to the evidence hence becoming merely 'a rubber stamp'. The judge is obliged to be satisfied that the assessors have, in forming their opinions, considered all matters that ought to be considered under the Act. (para 17)
- (2) The notes of proceedings showed that the valuation reports of both parties were considered by the assessors and counsel for both parties indicated to the court that they did not wish to cross-examine each parties' valuer. Therefore it was not correct to say that the valuation report of the plaintiffs' valuer was ignored. The learned judge had applied his mind to the matters that ought to be considered and had satisfied himself that the two assessors had complied with all requirements in making their decisions. (paras 17 & 18)
- (3) The amendment to the Act has not stifled the judge's exercise of judicial discretion in making the award of compensation. Sections 40D(2) and (3) have not deprived the plaintiffs of their right to adequate compensation as provided for under art. 13. (para 19)

A Case(s) referred to:

Nordin Salleh & Anor v. Dewan Undangan Negeri Kelantan & Ors [1992] 1 CLJ 463; [1992] 3 CLJ (Rep) 135 HC (**refd**)

Oriental Rubber & Oil Palm Sdn Bhd v. Pemungut Hasil Tanah, Kuantan [1983] 2 CLJ 30; [1983] CLJ (Rep) 677 HC (**refd**)

B *PP v. Kok Wah Kuan* [2007] 6 CLJ 341 FC (**refd**)

S Kulasingam & Anor v. Commissioner Of Lands, Federal Territory & Ors [1982] CLJ 65; [1982] CLJ (Rep) 314 FC (**refd**)

Singapore Para Rubber Estate Ltd v. Pentadbir Tanah Daerah Rembau, Negeri Sembilan [2009] 1 CLJ 13 FC (**refd**)

C Legislation referred to:

Courts of Judicature Act 1964, s. 84

Federal Constitution, arts. 4, 13, 121

Land Acquisition Act 1960, ss. 30, 40D(2), (3), 49

For the plaintiffs - Balwant Singh Sidhu; M/s Balwant Singh Sidhu & Co

D *For the defendant - Aida Adhha Abu Bakar SFC (Low Jiah Yee FC with him)*
AG's Chambers

Reported by Amutha Suppayah

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JUDGMENT

Aziah Ali J:

- F** [1] The plaintiffs' lands Lot No. 176 (held under Grant No. 36856), Lot No. 267 (held under Grant No. 28925) and Lot No. 268 (held under Grant No. 28926) were acquired under the Land Acquisition Act 1960 ("the Act") and an award of compensation was ordered by the Land Administrator. The plaintiffs were dissatisfied with the Award and the Land Administrator made a reference to the
- G** High Court under s. 30 of the Act.

- H** [2] At the land reference hearing, Mohd Hishamudin bin Mohd Yunus J (as His Lordship then was) was assisted by two assessors, Mr. Phuah Tick Lai, (Director, Valuation Department, Pahang) and Encik Mohd Basri Rahmat (Director, HASB Consultants Sdn Bhd). The learned Senior Federal Counsel relied on the valuation report prepared by a government valuer. The plaintiffs relied on the report and valuation of their valuer, Messrs. KGV-Lambert Smith Hampton, which according to the plaintiffs is an international firm
- I** of property valuers and consultants with several offices in the United Kingdom and in the United States of America.

[3] Mr. Phuah was of the view that the compensation should be RM198 per square foot, while Encik Basri was of the opinion that it should be RM201.60 per square foot. The learned judge accepted the opinion of Encik Basri (RM201.60), which was more favourable to the plaintiffs and made an order accordingly. The plaintiffs say that the opinion of their valuer who is a professional, qualified valuer from an international and reputable firm of valuers, appears to have been totally disregarded.

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[4] The plaintiffs say that in his grounds of judgment the learned Judge had said that his judicial discretion was limited by subsection 2 of s. 40D of the said Act, and that he was legally compelled to concur either with the decision of Encik Phuah or with the decision of Encik Basri. His Lordship said he was not at liberty to arrive at any other decision even if he were to disagree with their opinions. The learned judge felt bound by the legal constraints imposed upon him by s. 40D of the Act which states that the amount of compensation to be awarded shall be the amount decided upon by the two assessors, and if they differ, then the judge shall elect to concur with the decision of one of the assessors, and order the amount of compensation to be awarded accordingly. In his judgment the learned judge also said that by virtue of subsection (3) of s. 40D of the said Act, whatever decision he made pursuant to subsection (2) of s. 40D of the said Act is not appealable to a higher court. In other words the decision is final.

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[5] The plaintiffs are aggrieved by the outcome of the proceedings for the following reasons:

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(a) the learned judge felt bound to accept the opinion of either one of the two assessors. His exercise of judicial power was therefore limited to making that election only. Although he gave his reasons for electing to accept the opinion of Encik Basri instead of that of Encik Phuah, the plaintiffs do not know what the views of the learned judge would have been on the valuation done by the plaintiffs' valuer had the learned judge was not so constrained by the said subsection (2) of s. 40D of the said Act, and had His Lordship exercised an independent judicial discretion in the matter;

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(b) the learned judge observed that despite his limited judicial power, his finding is not appealable, and is final;

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- A (c) the plaintiffs have not received adequate compensation, as the opinions of the said assessors are vastly different from those of their valuers. There has been no adjudication on the merits, or independent judicial determination or exercise of judicial discretion.
- B The plaintiffs contend that since there is no right of appeal, their situation is aggravated and this accentuates the denial of their constitutional right to adequate compensation as there has been no real judicial determination of whether the compensation awarded to them is adequate or not. The deprivation of their right to adequate compensation was made possible by the amendments to the Act which took away the judicial discretion of the judge and took away the right to appeal. Hence by way of this application the plaintiffs challenge the validity of the amendments to the Act by Act A999
- C on the ground that their constitutional right to adequate compensation under art. 13 of the Federal Constitution has been violated, rendering the said amendments void.
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- [6] By way of this application the plaintiffs seek the following reliefs:
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- (1) a declaration that s. 40D(2) of the Land Acquisition Act 1960 is null and void and inoperative;
- (2) a declaration that s. 40D(3) of the Land Acquisition Act 1960 is null and void and inoperative;
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- (3) such further or other relief as to this Honourable Court deems just.
- [7] The application is premised on the following grounds:
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- (a) the reference to the High Court by the Land Administrator resulted in the learned judge of the High Court electing to accept the opinion of one of the two assessors appointed under the Land Acquisition Act 1960;
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- (b) the learned judge held that that was the limit of his judicial power in the matter, and that there could be no appeal against his decision;
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- (c) the plaintiffs are aggrieved that there has been no judicial determination as to whether the compensation awarded to them is adequate;

- (d) the plaintiffs contend that they have not received adequate compensation, in breach of art. 13 of the Federal Constitution. A

Submissions For The Plaintiffs

[8] Counsel for the plaintiffs submits that the Act must be read subject to art. 13 of the Federal Constitution. Counsel refers to the case of *S Kulasingam & Anor v. Commissioner Of Lands, Federal Territory & Ors* [1982] CLJ 65; [1982] CLJ (Rep) 314 FC where at p. 315 Abdoolcader J (as he then was) said: B

The legislature can, by clear words, exclude the principles of natural justice in the absence of constitutional guarantees ... C

Counsel submits that the law cannot provide for compulsory acquisition or use of property without adequate compensation and refers to *Oriental Rubber & Oil Palms Sdn Bhd v. Pemungut Hasil Tanah, Kuantan* [1983] 2 CLJ 30; [1983] CLJ (Rep) 677 wherein VC George J said that the implementation of the various sections of the Act must be effected to the end, *inter alia*, that the subject who is deprived of his property is provided with adequate compensation. However it is submitted that this is no longer so if the amendments to the Act by Act A999 is left unchallenged. It is contended that s. 40D of the Act had rendered the exercise of a fundamental right under art. 13 of the Constitution illusory and has in fact rendered it non-existent which counsel submits is a serious breach of the fundamental right under art. 13. Counsel refers to the case of *Nordin Salleh & Anor v. Dewan Undangan Negeri Kelantan & Ors* [1992] 1 CLJ 463; [1992] 3 CLJ (Rep) 135 wherein Eusoff Chin J (as he then was) said that where a statute directly affects the fundamental right, or its inevitable effect on the fundamental right is such that it makes the exercise of the right ineffective or illusory, the statute must be held to be unconstitutional, and must be struck down. Therefore it is submitted that any amendment to the Act which renders this constitutional guarantee nugatory, or illusory, must therefore be struck down as unconstitutional. D E F G

[9] It is the plaintiffs' contention that s. 40D of the Act has reduced the judge to a mere rubber stamp as the provision has so shackled the judge that all that the judge is required to do is to decide which of the two opinions he accepts as adequate compensation. To quote the words of counsel for the plaintiffs in his submissions in reply, "By putting the judge of the High Court H I

- A in a ‘straight-jacket’ and taking away his judicial discretion, the impugned s. 40D effectively leaves undetermined the question whether the compensation is adequate, as the learned judge observed – he is constrained to accept the opinion of 1 of the 2 assessors, even if he does not agree with both of them.” It is submitted that
- B had it not been for this provision, the judge would have considered the evidence of experts called by both sides and made a judicial determination and truly exercised judicial discretion. However, now the judge cannot satisfy himself that the compensation given is ‘adequate’. The amendments to s. 40D have deprived land owners
- C whose lands are acquired under the Act of adequate compensation because the court is now constrained by law to accept one of the opinions of the assessors as being adequate compensation. Counsel submits that the amendment to the Act does not allow the judge to make a proper judicial determination of adequate compensation
- D and has so stultified judicial activity as to render the judge of the High Court impotent to do justice.

Defendant’s Submissions

- E [10] The learned Senior Federal Counsel raised the issue of the requirement for leave under cl. (4) of art. 4 of the Federal Constitution. It is submitted that the validity of s. 40D(2) and (3) cannot be questioned unless leave has been obtained from the Federal Court. Having perused art. 4, I agree with counsel for the
- F plaintiffs that the instant application does not come within the ambit of art. 4 and leave from the Federal Court is not required.

- G [11] The learned Senior Federal Counsel also referred to s. 84 of the Courts of Judicature Act 1964 and submits that the plaintiffs ought to make an application at the High Court for the Federal Court to decide on the constitutional issue for speedy and economical final determination of the proceedings in the High Court. A perusal of s. 84 shows that its provisions may be resorted to where “a question arises as to the effect of any provision of the Constitution ...”. In my opinion the present application does not
- H come within the ambit of s. 84. Therefore this court can hear this application.

- I [12] The learned Senior Federal Counsel further submits that s. 49 of the Act bars the plaintiffs from appealing against the award of compensation. I am unable to agree with counsel’s submissions. The issue in this application is the constitutionality of ss. 40D(2) and

(3). It may well be that a decision on this application may have consequential effect on the decision in the land reference matter but this application is not an appeal against the award of compensation.

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[13] In respect of the application the learned Senior Federal Counsel submits that art. 121 of the Federal Constitution provides that the High Courts and the inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law. In *PP v. Kok Wah Kuan* [2007] 6 CLJ 341, Abdul Hamid Mohamad, PCA (as His Lordship then was) said *inter alia*:

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The jurisdiction and powers of the two High Courts are now prescribed by federal law and not dependent on the interpretation of the term 'judicial power' as prior the amendment.

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[14] It is submitted that the jurisdiction of the High Court to adjudicate cases pertaining to land acquisition must be in accordance with the law as provided for under Part V of the Act. The jurisdiction and powers of the judge derives from s. 40D(2) and (3) of the Act. Learned Senior Federal Counsel refers to the case of *Singapore Para Rubber Estate Ltd v. Pentadbir Tanah Daerah Rembau, Negeri Sembilan* [2009] 1 CLJ 13. In that case the Federal Court held as follows:

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This was not a case where art 13 of the Federal Constitution had been infringed. Where all the provisions of the Act have been complied with and due compensation is offered, land owners cannot complain of any violation of art 13 (see paras 54 & 57).

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Therefore it is submitted that the observations of the learned judge in his judgment has to be read within the context of the case and ought not to be read as holding that the provisions of s. 40D(2) and (3) of the Act as limiting his judicial power to adjudicate the matter.

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Decision

[15] The issue before the court is whether, as the plaintiffs contend, the amendments made to s. 40D of the Act by Act A999 has constrained the exercise of judicial discretion in determining adequate compensation and has reduced the role of the judge to a mere rubber stamp thereby denying the plaintiffs adequate compensation as provided for under art. 13 of the Federal Constitution thus rendering such amendments unconstitutional and

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- A null and void. The issue arises out of the judgment of Mohd Hishamudin Mohd Yunus, J and the grounds for this application are premised on the observations made by the learned judge in his judgment. Hence to understand the plaintiffs' submissions and for ease of reference it is appropriate to reproduce part of the grounds of judgment relevant to this application as reported in [2008] 1 LNS 15; [2008] 7 MLJ 479 as follows:
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Decision of the Court on compensation

- C 40D(1) In a case before the Court as to the amount of compensation or as to the amount of any of its items the amount of compensation to be awarded shall be the amount decided upon by the two assessors.

- D (2) Where the assessors have each arrived at a decision which differs from each other then the Judge, having regard to the opinion of each assessor, shall elect to concur with the decision of one of the assessors and the amount of compensation to be awarded shall be the amount decided upon by that assessor.

- E (3) Any decision made under this section is final and there shall be no further appeal to a higher Court on the matter.

In the present case, the assessors differ in their decisions. Encik Phuah was of the view that the compensation should be RM198 p.s.f.. His opinion can be found at encl. 40. Based on Encik Phuah's valuation, the award should be RM32,713,577.32.

- F Encik Basri, on the other hand, was of the opinion that the compensation should be RM201.60 p.s.f.. His opinion can be found at encl. 41. Based on Encik Basri's valuation, the award should be RM33,307,932.05.

- G It will be observed that their opinions on the value are quite close to one another. It is only RM3.60 apart (ie RM201.60 - RM198).

Under the law my decision would have to be within the constraints of subsection (2) of section 40D.

- H By reason of subsection (2) of section 40D, my judicial discretion is limited: I am legally compelled to concur either with the decision of Encik Phuah or with the decision of Encik Basri. I am not at liberty to arrive at any other decision – even if I were to disagree with their opinions.

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And, if I may add, by virtue of subsection (3) of section 40D, whatever decision that I make, pursuant to subsection (2), is not appealable to a higher Court. In other words, the decision is final.

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In the present case, I find both opinions apply the correct valuation principle (the comparative method), had chosen the ideal comparable, namely, Lot 26, had made the appropriate adjustments, and had taken into account similar factors in making the adjustments (location factor, size factor, time factor, development potential factor and squatters actor). Their differences are only on the percentage to be given for each of the factors, but even here the differences are small. In short, both opinions are equally sound and respectable.

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I had accepted the opinion of Encik Phuah (RM201.60). I so elected because this is the higher value and hence is favourable to the applicants/landowners. In my judgment it is a sound principle that where both valuers had applied the correct principle of valuation (the comparative method), had chosen the same comparable (Lot 26), had taken similar factors into account for the purpose of adjustment, had arrived at opinions very close to one another, the Court should elect to adopt the valuation that favours the landowners. This is to my mind in consonance with the spirit of Article 13 of the Federal Constitution. Article 13 states:

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Rights to property

13(1) No person shall be deprived of property save in accordance with law.

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(2) No law shall provide for the compulsory acquisition or use of property without adequate compensation..

In the present case, it clear that the amount claimed by the applicants/landowners is far in excess of the amount awarded to them by this Court. Hence, invoking section 51 of the Land Acquisition Act, I held that the applicants were not entitled to costs. In addition I ordered the applicants to pay to the Land Administrator 50% of the Land Administrator's costs ...

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[16] Section 40D of the Act provides as follows:

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40D. Decision of the Court on compensation

(1) In a case before the Court as to the amount of compensation or as to the amount of any of its items the amount of compensation to be awarded shall be the amount decided upon by the two assessors.

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- A (2) Where the assessors have each arrived at a decision which differs from each other then the Judge, having regard to the opinion of each assessor, shall elect to concur with the decision of one of the assessors and the amount of compensation to be awarded shall be the amount decided upon by that assessor.
- B (3) Any decision made under this section is final and there shall be no further appeal to a higher Court on the matter.

C [17] The law accords the judge with two experts whose sole role is to decide the amount of compensation after having considered the documentary evidence including the valuation reports of both parties and the submissions made. The duty of the two assessors is therefore limited to that extent. The law does not contemplate that the judge is merely to preside without listening to the evidence hence becoming what counsel for the plaintiffs term as merely 'a rubber stamp'. There is no abdication of duty by the judge as he is obliged to hear the evidence and submissions together with the two assessors. The judge is obliged to be satisfied that the assessors have, in forming their opinions, considered all matters that ought to be considered under the Act. The Notes of Proceedings (Tab A of the Defendant's Bundle of Authorities) show that the valuation reports of both parties were considered by the assessors and counsel for both parties indicated to the court that they do not wish to cross-examine each parties' valuer. Therefore it is not correct to say that the valuation report of the plaintiffs' valuer was ignored.

F [18] Having perused the grounds of judgment, I am of the view that the plaintiffs' counsel has ignored what the learned judge has to say about the opinions of the two assessors. From his judgment it is clear that the learned judge has applied his mind to the matters that ought to be considered and has satisfied himself that the two assessors had complied with all requirements in making their decisions. At the risk of repetition, I reproduce below the relevant part of the judgment:

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H In the present case, I find both opinions apply the correct valuation principle (the comparative method), had chosen the ideal comparable, namely, Lot 26, had made the appropriate adjustments, and had taken into account similar factors in making the adjustments (location factor, size factor, time factor, development potential factor and squatters factor). Their differences are only on the percentage to be given for each of the factors, but even here the differences are small. In short, both opinions are equally sound and respectable.

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Therefore having satisfied himself that the two assessors had considered all relevant matters and applied the correct principles, just as a judge sitting alone is obliged to do, the learned judge applied the principle that where there are two conflicting opinions, the opinion more favourable to a litigant ought to be adopted. His Lordship opined that this is in consonance with the spirit of art. 13. His Lordship said as follows:

... I had accepted the opinion of Encik Phuah (RM201.60). I so elected because this is the higher value and hence is favourable to the applicants/landowners. In my judgment it is a sound principle that where both valuers had applied the correct principle of valuation (the comparative method), had chosen the same comparable (Lot 26), had taken similar factors into account for the purpose of adjustment, had arrived at opinions very close to one another, the Court should elect to adopt the valuation that favours the landowners. **This is to my mind in consonance with the spirit of Article 13 of the Federal Constitution** ... (emphasis added)

I agree with the learned Senior Federal Counsel that the learned judge's observation on the law in his judgment has to be read in its proper context. I am of the view that the plaintiff's counsel has misconstrued the observations made by the learned judge.

[19] For the aforementioned reasons I am unable to agree with counsel for the plaintiffs that the amendment to the Act has stifled the judge's exercise of judicial discretion in making the award of compensation or that ss. 40D(2) and (3) have deprived the plaintiffs of their right to adequate compensation as provided for under art. 13. Consequently the application is dismissed with costs of RM5,000 to the defendant.

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